Rockland Lake Manor, Inc. *and* Local 6, Hotel, Restaurant & Club Employees and Bartenders Union, AFL-CIO. Case 2-CA-17477

September 15, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On April 14, 1982, Administrative Law Judge Robert T. Snyder issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and counsel for the General Counsel filed a response in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Rockland Lake Manor, Inc., Congers, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The citation to *Soloboro Knitting Mills* in fn. 19 of the Administrative Law Judge's Decision is corrected to read 227 NLRB 738 (1977) and the citation to *Sevakis Industries, Inc.*, in fn. 23 of the Administrative Law Judge's Decision is corrected to read 238 NLRB 309 (1978).

The Board considers the citation of *Peerless Plywood*, 107 NLRB 427 (1953), fn. 28 of the Administrative Law Judge's Decision, unnecessary and confusing in the circumstances and also corrects the reference to captive "evidence" to read captive "audience."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT threaten our employees with discharge if they join or continue their membership in, or support of, Local 6, Hotel, Restaurant and Club Employees and Bartenders Union, AFL-CIO, or any other labor organization; coercively interrogate our employees about their union views; promise benefits to our employees if they abandon their support of the Union; inform our employees we will no longer deal with the Union as their collective-bargaining agent; offer to recognize a new union or grievance committee formed by our employees or to enter into individual contracts with them; or encourage, induce, and aid our employees in preparing, signing, and filing a decertification petition.

WE WILL NOT poll or otherwise interrogate our employees to ascertain their union views in the absence of objective considerations warranting a reasonable doubt of the Union's continuing status as the collective-bargaining representative of the majority of our employees.

WE WILL NOT refuse to recognize or bargain collectively with the aforementioned Union as the exclusive representative of our employees in the appropriate unit described below, by engaging in the foregoing conduct: bypassing the Union and dealing directly with our employees and undermining the status of the Union as such exclusive representative, by withdrawing recognition and refusing on and after August 1, 1980, to meet and bargain collectively with the Union, and by unilaterally changing established terms and conditions of employment of employees in the bargaining unit by discontinuing vacation and health and welfare contributions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL bargain on request with the aforementioned Union as the exclusive representative of our employees in the appropriate unit concerning wages, hours, vacation and health and welfare benefits, and other terms and conditions of employment and, if an understanding is reached, embody it in a signed document. The appropriate unit is:

All waiters, waitresses and bartenders employed at our facility located at Route 9W, Congers, Rockland County, New York.

WE WILL make whole our employees in the above unit by paying all vacation and health and welfare contributions as required by the collective-bargaining agreement that expired July 5, 1980, to the extent that such contributions have not been made or that our employees have not otherwise been made whole for their ensuing medical expenses and lost vacation credits, and continue such payments until we negotiate in good faith with the Union to a new agreement or to an impasse. This shall include reimbursing any employees who themselves contributed to the maintenance of health and welfare coverage and vacation benefits after we unlawfully ceased contributing.

WE WILL compensate the Union's fringe benefit and vacation funds for administrative costs and other expenses and loss of interest incurred by the funds as a result of their acceptance of retroactive payments required to be made hereunder.

WE WILL notify, in writing, all persons employed in the bargaining unit after July 5, 1980, of their entitlement to damages for loss of benefits.

ROCKLAND LAKE MANOR, INC.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge: Upon a charge filed by Local 6, Hotel, Restaurant & Club Employees and Bartenders Union, AFL-CIO, herein called the Union or Local 6, on August 18, 1980, a complaint issued on September 30, 1980, alleging that Rockland Lake Manor, Inc., herein called the Manor or Respondent, by interrogating its employees concerning their union sentiments and activities, threatening them with discharge if they continued to support the Union, promising them benefits if they abandoned their union support, informing them it would no longer deal with the Union, polling them concerning their union support, supporting, approving, and circulating a petition seeking to decertify the Union as collective-bargaining agent of certain of its employees in an appropriate unit,[1] and by ultimately refusing to meet and bargain with the Union, thereby interfered with its employees' Section 7 rights, bypassed the Union and undermined its exclusive representative status, and refused to bargain collectively with the Union, in violation of Section 8(a)(1) and (5) of the Act.[2]

Respondent filed an answer denying the allegations of violation of the Act, and pleaded three affirmative defenses. In the first, Respondent asserts a good faith doubt to the Union's continued majority status, specifically relying on the alleged independent filing of the decertification petition in Case 2-RD-1017. In the second, Respondent refers to alleged threats of future loss of employment at other places of employment made by the Union to employees to induce their support and that such threats communicated to Respondent's officers supports Respondent's good-faith belief that the Union did not represent an uncoerced majority of its employees. The third defense asserts that, by its threat, the Union forfeited its standing to complain against Respondent.

Hearing was held before me in New York, New York, on May 11 and 12, 1981. Briefs were thereafter filed by the General Counsel and Respondent and have been duly considered. Upon the entire record in this case, including my observations of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a New York corporation with an office and place of business located at Congers, New York, where it is engaged in providing food catering services to the general public. During the past year, Respondent derived gross revenues in excess of $50,000 from performing such services, and purchased and received at its facility products, goods, and materials valued in excess of $5,000 directly from points outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Collective-Bargaining Relationship and Parties' Position on Contract Renewal*

From 1972, when Respondent first voluntarily recognized a local predecessor of the Union, also affiliated with the same International Union, until 1980, the Manor and Local 6 or a predecessor were parties to successive collective-bargaining agreements, the most recent of

[1] Ultimately filed by employee James P. Cahill on August 12, 1980, in Case 2-RD-1017.

[2] A charge in Case 2-CB-8535, filed by Respondent against the Union on October 7, 1980, alleging a threat to an employee that the Union would cause him to lose his job if the Union were decertified in connection with the election to be held in Case 2-RD-1017, resulted in issuance of a complaint against the Union on November 21, 1980, and an Order consolidating the CA and CB cases for hearing. Prior to opening of the consolidated hearing, the Union agreed to an informal settlement agreement in Case 2-CB-8535, resolving all issues in the case, including the posting of a notice to employees and members, not joined in by the Manor as Charging Party, but approved by the Acting Regional Director, with the consequence that by Order dated May 8, 1981, the Acting Regional Director severed Case 2-RD-1017 from the instant proceeding.

The decertification petition in Case 2-RD-1017 was ordered dismissed by the Director on October 3, 1980, upon issuance of the instant complaint, and no appeal was taken from that order.

which were effective by its terms for the period July 1, 1978, through July 5, 1980.[3] In that agreement, Respondent recognized Local 76, and then, by the addendum, Local 6 as the sole and exclusive bargaining representative in a unit of its employees consisting of all of its waiters, waitresses, and bartenders. The parties stipulated that these classifications of Respondent's employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The 1978–80 agreement provided that it shall be self-renewing for yearly periods following July 5, 1980, until and unless either party notifies the other in writing at least 60 days before July 5, 1980, or the expiration date of any subsequent yearly period of its desire to negotiation, neither party shall change the terms of conditions existing under the agreement.

By letter dated April 22, 1980,[4] Union Vice President Michael Campbell informed Respondent of the Union's desire to renew the expiring contract with certain modifications and sought a response to set up negotiations. By letter dated April 28, Respondent President Albert Bajada informed Campbell that the Manor did not desire to renew the current agreement.

B. *The Alleged Respondent Campaign To Rid Itself of the Union*

In spite of the Manor's position on contract renewal, a meeting was arranged by the parties on the Union's demand to be held a few days before the July 5 contract termination date. Some weeks prior to the first meeting, during a weekend party catered by Respondent at its premises in early June, longtime employee Virgil Muccio testified that at a meeting between them held in General Manager Richard Rovegno's office, Rovegno told him that the Company wanted to get rid of the Union—all the bookkeeping in connection with the Union was a pain in the neck and the Union was not doing anything for the employees and they could do better off without it. Noting that Muccio and Joan Lasofsky, the union steward and another senior employee, would probably be against such a move, Rovegno asked Muccio how he felt about it. Muccio replied that he would have to think about it and let him know. A week or so later, Muccio told Rovegno he might be willing to go along without the Union. Rovegno suggested he speak to President Albert Bajada. A short time later, Muccio approached Bajada while at work, said, "I understand you want to get rid of the Union," and asked what was he offering. Bajada said the employees would be getting $1 more a job, the Manor would still operate in accordance with seniority as under the union agreement, working conditions would not be changed, the employees would receive Blue Cross/Blue Shield health care protection in place of the Union's welfare fund, and nobody would be fired. Bajada also referred to the bookkeeping on union remittances as a pain in the neck.

Near the end of June, after this discussion with Bajada, Rovegno again spoke with Muccio late one afternoon, calling him into one of the Manor's offices. Rovegno now said Respondent was getting rid of the Union and anybody that stayed with the Union would not be working there anymore. He said he would hate to see that happen. Any employees that stayed with them would be taken care of. Rovegno added he would hate to see people leave. He would hate to lose a lot of people that were working there. On another occasion, on a weekend in late June 21 or early July, probably on the July 4 weekend, Muccio was working as a waiter during the cocktail hour. While waiting outside the cocktail room to remove used glasses and dishes and standing in the hall near one of the offices, Muccio heard Bajada speak briefly inside the office, the door to which was partially ajar. Muccio saw three newly hired waiters in the office with Bajada and heard Bajada tell them that there would not be a union there and that anybody that belonged to the Union would not be working for Respondent. Within a matter of seconds Bajada walked out of the office, and Muccio resumed his tasks.

Neither Rovegno nor Bajada denied the statements attributed to them in these conversations bv Muccio except that Rovegno did deny any threat made to Muccio to discharge employees who stayed with the Union, and Bojada denied, generally, any conversations with his employees about terminations or discharges. Bojada did not testify as to any conversations with Muccio. Rovegno, when asked about the June conversation with Muccio during Respondent counsel's direct examination of him, was vague and conclusionary in his responses, but even his limited testimony was, if anything, corroborative of Muccio's. Thus, when asked by Respondent's counsel how a June conversation with Muccio came about and then what was said, Rovegno first alluded to the fact that he and Muccio were pretty close, they talked a lot and Rovegno had learned about Muccio's concern with what was happening with the Union, then noted that Muccio was in a position where he had to back the Union because he was brought there by them and was afraid Rovegno might look at him in a bad way because he was backing the Union. Then, a question as to what was said about it brought a lengthy pause followed by the answer that "basically, we discussed the situation that had been coming about, and his having to back the Union." After counsel first introduced Joan Lasofsky's name in a question, Rovegno acknowledged her name coming up in his conversation with Muccio, and without answering directly a question as to how Lasofsky's name had come up, referred to Muccio's using her name whenever he would talk to him about Rockland Lake Manor since she had trained him and he found her to be supportive.

Bajada, called as an adverse party witness by the General Counsel under Section 611(c) of the Federal Rules of Evidence, was argumentative, continually fenced with the General Counsel, and contradictory in his testimony. At first denying he ever told his employees at a meeting he called prior to the expiration of the contract that he had terminated the contract, after being shown his pre-

[3] In a 1979 addendum to that agreement, Respondent recognized Local 6 as the successor to Local 76, Hotel and Restaurant Employees and Bartenders Union, AFL–CIO, and as the collective-bargaining agent for its employees covered in the contract.

[4] Unless otherwise noted, all dates refer to 1980.

trial affidavit he finally admitted telling the employees he had terminated the contract. Bajada's direct testimony during presentation of Respondent's defense was also confusing in his characterization of the bargaining which occurred during his meetings held with the Union starting in early July, at one point referring to an "agreement" reached on wages at the meeting, and then later noting that wages were one of the open, unresolved items from the very first meeting to the last. I conclude that Bajada's testimony where it conflicts with Muccio's is basically unreliable and I shall not credit it.

In contrast to Rovegno's ramblings, vagueness, and evasions in this area and others to be discussed, Muccio's testimony was straightforward, lucid, to the point, and consistent on both direct and cross-examination. Furthermore, both Rovegno and Bajada in their testimony about the meetings held with employees in July, to be reported *infra*, at which Respondent's negative views of the Union were expressed and offers of benefits to the employees were made if they decided to reject the Union, corroborated, generally, their hostility toward the Union and their interest in seeking to encourage employee rejection made manifest in the conversations reported by Muccio and which took place even before any meetings with the Union had been held. I thus credit Muccio's testitony as far more reliable and do not credit Rovegno's denial of the threat of discharge attributed to him, or Bajada's general denial of any conversations about discharges.

Three other General Counsel witnesses testified to meetings called by Respondent during July dealing with the Union, and their participation in a poll of the union sentiments of the employees conducted by Respondent during July.

According to Respondent's president, Bajada, approximately 17 or 18 employees were employed as waiters, waitresses, and bartenders in July. This number included a few employees recently hired to fill out Respondent's needs for catered affairs. All were employed on a part-time basis to work the affairs held on weekends and evenings. Again, according to Bajada, at least 15 employees were members of the Union.[5]

Employee Kieran Harris recalled attending a general employee meeting called by Respondent and held toward the end of July at 7 p.m. in one of the rooms at the Manor. Approximately 12 to 15 employees attended comprising most, if not all, of the unit employees as heretofore estimated.

After Rovegno spoke about general work tasks, Bajada got into union matters. He disclosed that the union demand for a wage increase in a successor contract was totally out of the question as Respondent was already paying the highest rates in Rockland County and he did not feel this increase was warranted. Then Bajada said that, if there were no union at Rockland Lake Manor, then instead of paying dues to the Union the individuals would get the dues and the waiters would also receive the additional $2 per party or catered affair which also goes to the Union.[6]

Employee Harris was also called into Rovegno's office about the same time and asked to vote for or against having the Union continue to represent the employees. He was given a slip of paper, told to write yes or no on it, representing his views about the Union without placing his name on the paper and to do this after Rovegno left the room. He was then to drop the paper through a slot into a sealed box on Rovegno's desk. Rovegno also informed Harris that what he wrote down would have no effect on his job.

Another employee, William Smith, also recalled an employee meeting held on the premises in late July. He described this as the second of two meetings held that month and that he missed the first. A notice from management was posted to attend and he also recalls being informed the employees would be docked work 1 week for failure to do so. There were 12 to 14 employees present, including 12 union members, along with Rovegno and Bajada. Rovegno first discussed fundamental rules of service on waiting parties. He then mentioned an employer offer of $35 per party for the employees in place of the $30 then being paid.[7] At this point, Bajada interceded and took over addressing the employees. Bajada explained that the $35 was better than what the Union was offering. The $35 included $1.25 toward a vacation fund, $1 for a uniform fee,[8] and an additional amount for health benefits to replace coverage under the union fund. He then told the employees it was up to them, if they did not agree to what he was offering, they were welcome to go on strike and he was willing to take a strike. So the employees had a choice of sticking with the Union and going out on strike or going along with his proposal of $35 a party. He also told the employees he would be hiring new employees who were not union members and would therefore provide more certainty of coverage during the busy season.[9] Bajada also informed the employees that if they were afraid of losing their jobs because there was no union to protect them, there would be an employee vote before any employee would be terminated. If the employees decided to go on strike and they wanted another job he would provide them with a positive reference.

[5] The contract contains a 30-day union-shop clause. There is some discrepancy between the figure of 15 and a payroll report of dues remission pursuant to the contract dues and initiation fee checkoff clause for the first week of July—at the time the contract terminated—showing 10 dues-paying members. Union dues was $8.50 per month. A report of welfare fund contributions for the month of June based on hourly earnings also required by the contract, lists the same 10 individuals. The decertification petition filed by employee James P. Cahill on August 12, lists 17 employees in the unit. Cahill was not listed on the earlier reports, was not a union member, and had only recently begun to work as a waiter after starting employment for Respondent as a dishwasher outside the unit. I conclude that Bajada's figure of 17 or 18, and 15 union members probably refers to mid-July to August, but that through June and into July, the unit consisted of approximately 10 to 14 employees, of whom 10 were members of the Union.

[6] Under the last union agreement, as of January 1, 1979, Respondent was required to pay $2 per job into the Union's fringe benefit fund for each employee who works.

[7] Under the 1978–80 contract, the banquet wage schedule, schedule "A," provided for waiters and waitresses to receive $30 for a 5-hour dinner party or buffet dinner as of July 1, 1979.

[8] The contract provided $1 clothing allowance per job for maintenance of working uniforms.

[9] A busy season had ended in June. Another would occur in September and October.

Smith also described being polled about his union sentiments in an election conducted by Rovegno in early August. He was called to Rovegno's office between service of courses during a party. Rovegno told him the Union wanted to stay, but management wanted to break away. They were going to court and it would probably come to nothing, and they were just having a general vote by secret ballot to see whether the employees wanted the Union or not. Rovegno asked if Smith wanted to continue to pay $8 a month to the Union. He then left Smith in the room alone to cast his ballot, told him not sign his name, and place it through a slit into a sealed cardboard box. Smith was not told whether his vote would affect his job in any way. The results of the ballot were never announced.

Union Steward Lasofsky also testified about attending two general employee meetings at which management discussed the Union. Lasofskv also recalled being directed to attend by a posted notice. At the first, held at the end of July, and attended by about 10 employees, Manager Rovegno talked about general service at affairs and then went on to note that the Union was out so the employees will work according to seniority. A few weeks later, at another general meeting at the premises which the employees were also directed to attend, after Rovegno again discussed service, Bajada offered the assembled employees the money Respondent had heretofore paid into the union funds for their raises if the Union was no longer there. This was an offer of direct payment to the employees of the $2 per job worked previously paid into the Union Fringe Benefit Fund plus the contractual $1.25 vacation benefit earned per job,[10] totaling between $3 and $4 per job.[11] Bajada also offered to enter an agreement with the employees providing the protection of an employee committee to receive notice and the opportunity of prior discussion before Respondent fired anyone.[12] In response to employee questions about seniority and job security, Bajada informed them that everyone would still have their job.

Lasofsky also related her participation in the employer-run balloting on union support among the employees. Sometime after the second general meeting, Rovegno approached her on the job and asked her to come to his office after work. When she did, he explained he wanted to take a vote to see how many people wanted the Union, he gave her a slip of paper and told her to write on it whether or not she wanted the Union to continue to represent her. While Rovegno was still in the room, she wrote down her preference, folded the paper in half, gave it back to him, and left.

As earlier noted, Bajada testified he told the employees even before July 5 that he was terminating the contract. He also admitted informing the assembled employees on the same occasion that they would get the money that had been going to vacation stamp and health and welfare payments, approximately an increase of about $4 per employee per job. He also told them they could keep the Union, but in that event, the moneys described would go directly to the Union and they would only receive whatever increase was negotiated. Bajada also admitted informing the employees that if there were no union, they could get together as a group and if they had a problem they could bring it up to him and he would discuss it with them and would go along with whatever was fair. He would even enter into contracts with them if the Union was out. Bajada also directed Rovegno to set up a vote to see if the employees wanted the Union.

On Respondent's direct case, Rovegno testified that at the first of two meetings he called, held in mid-June, after he addressed matters of service and spoke briefly about the status of negotiations, he left the meeting before Bajada spoke to the employees. As to the second employee meeting held near the end of July, Rovegno testified on Respondent's direct that after discussing basic service he may have mentioned that the Manor was still negotiating with the Union, and reasserted that Respondent was maintaining the benefits that the employees were receiving as far as insurance and vacation stamps.[13] On cross-examination, Rovegno now added to the comments that he testified on direct he made to the employees at the July meeting. He informed them that they could either go get another union, or they could create a union within themselves. As to the benefits that they had been receiving up to that time under the union contract, vacation, uniform allowances, welfare insurance, almost $5 a job, Rovegno testified contrary to his direct testimony, that he told them he was keeping track of it, until he knew what was happening with the negotiations, he would retain it, if they wanted it they could ask him for it. Rovegno added that "toward the end" some of the employees had asked for the moneys and he had paid it to them. Rovegno echoed Bojada's comments made at the earlier meeting, by telling the employees that, if the Union were out, he would give them the benefits directly. If the Union were retained, they would receive the benefits through the Union. At the time, according to Rovegno, negotiations with the Union were going on. At the time of the first meeting with employees, they had not yet started. Rovegno also described as a tactic having himself first discuss the etiquette of service and then turn the meeting over to Bajada who would discuss the union matters he was more familiar with.

Rovegno acknowledged that right from the beginning, he brought up to the employees the possibility that the Union at Rockland Lake Manor would be out. He also testified that some of the waiters, without identifying them, except in one case, had begun to show their concern that they were not getting the best representation from the Union but that he had repeatedly put it to the employees that the decision (on whether to retain the

[10] The 1978-80 contract required a contribution of $1.25 for each employee per job to a vacation fund. The practice was for Respondent to buy vacation stamps from the Union which would be turned over to the employee who earned them for redemption into cash by the Union.

[11] During the busy seasons, employees worked up to four jobs per week.

[12] The 1978-80 agreement provided for final and binding arbitration of discharges and other grievances.

[13] In fact, Respondent stipulated on the record contrary to this testimony that the last health and welfare payment made to Local 6 concerning the employees of Rockland Lake Manor was for the month of June. The parties also agreed that the last dues payment for the Manor's employees was made by Respondent to Local 6 for the month of July and that the last receipt for vacation stamps purchased by Respondent from the Union was given to Respondent on September 11.

Union as their exclusive bargaining agent) was theirs. He would aid them all he could in understanding what they could do for the situation, but he would not have any part of it.

During Rovegno's examination by General Counsel, he described in some detail, conversations with James P. Cahill, the employee who later filed the decertification petition dismissed by the Region. Cahill, called by Respondent as a witness, also testified to them. Cahill started working for the Manor in October 1979. For 6 months he was on the maintenance staff, doing odd jobs, including dishwashing. In April or May, Rovegno promoted Cahill to part-time waiter. While he continued doing kitchen work, he had been assigned to some parties as waiter when extra help was needed. After a time, in May or June, Cahill went to Rovegno to complain that he was not getting enough work as a waiter and that he needed the extra money. Rovegno told him "there's a union guideline that I have to stick to which states that seniority is what I based my schedule on."[14] Rovegno also said that come September, after the slow summer period, when work picks up again and some of the college students with more seniority go back to school, he would be able to work some more on parties. Sometime later, in June or July, while working on maintenance during the week, Cahill again approached Rovegno as to why he could not get more parties. Rovegno replied that although Cahill was a better waiter than some of the others, he could not give him more parties because he was low man on the seniority list. Cahill mentioned he was not in the Union and asked what he could do to get around this lack of jobs, if there were any steps he could take. Rovengo replied, "Well, if you had enough backing, you could probably get out of the Union, but I really don't know."[15] At Cahill's request, Rovegno agreed to find out how to get the Union out. He contacted the Board's Region 2 offices and learned about the decertification petition process and arranged to obtain a decertification form which he later passed along to Cahill. During a third conversation with Cahill, probably at the end of July, in addition to providing Cahill with the form, Rovengo also informed Cahill there was a way of getting a petition up and having other employees sign it. He also informed Cahill that the petition would have to say that the undersigned did not want to be represented by the Union, it would have to be dated, and the form and the petition would both have to be mailed to the National Relations Board.

Under further questioning by me Rovegno appeared to prevaricate as to his knowledge of the accompanying petition, first noting "I gave Cahill a couple of things, this (the decertification form) might have been the first" then immediately pleading a poor recollection and then later describing the petition as handwritten, and then, when asked how he knew, answering, "How do I know? I really shouldn't have said that. I'm not too sure," and finally denying that he had ever seen it. Rovegno also testified that when later asked by another employee about the legality of employee solicitations on the Employer's premises, he had responded "as far as I was concerned, even if you've got to get it off the premises, get the list."

Based on the foregoing, as well as my conclusions as to Rovegno's unreliability as a witness, I conclude that in addition to suggesting to Cahill the decertification route and advising him as to the Board's procedures, Rovegno kept himself informed as to the steps being undertaken by employees and the documents being prepared, and made further suggestions to assist certain of the employees in pursuing the Union's removal as their bargaining agent.

Rovegno also confirmed the secret-ballot election he conducted among the employees. He testified on direct examination that since some of the waiters had begun to show their concern that they were not getting the best representation from the Union, by July the point had been reached that he decided to take a ballot himself to see where the Company stood. He brought the employees into the office one at a time and asked each of them to mark "yes" or "no" on a piece of paper whether they wanted the Union or not, without disclosing their identity on the paper, and put the paper through a slit into a small box he had sealed. Only Lasofsky marked her ballot in his presence. He told them he was taking a poll to find out which way the union support lay. He left the office after telling the employees not to mark the ballot in his presence except in the one case, and when they were finished they came out and handed him the box. Lasofsky told him she had to back the Union, if she did not she would get no work anywhere, and wrote "yes" in his presence. On cross-examination, Rovegno, refreshed by his affidavit, recalled the poiling as having occurred in July. He also confirmed that he told Muccio and Lasofsky, at least, that he would not disclose the results. According to Rovegno, the ballots were destroyed at the time of the count, but the results showed 5 in favor of the Union, 12 against, and a few abstentions.

With respect to the two addresses made to assembled employees at Respondent's premises, I credit the three employees' recollection of the statements made to them by Rovegno and Bajada. Significantly, all three corroborated the offers of direct payments of certain moneys previously remitted directly to the Union under the contract, in the event the employees rejected continued

[14] Sec. 7 of the 1978-80 agreement provides for a seniority list to be maintained by management from which the distribution of amount of days worked, overtime, days off duty, layoffs, and vacations was to be made, with the most senior persons to have preference.

[15] Based on this response to a question posed by me as to the circumstances under which the second discussion with Cahill was held, I conclude that Rovegno first introduced the subject of getting out of the Union into the discussion, although under the General Counsel's earlier examination, Rovegno testified initially that he recalled Cahill asking if there was a way to get out of the Union. Cahill's testimony does not conflict with what I have concluded here. Cahill first drew a blank as to Rovegno's reply to his complaints, explaining that he was nervous. After Respondent counsel sought to refresh his recollection by showing him the decertification petition he later executed, Cahill responded, "I was asking Rick, is there any way that I can get more parties, I wasn't even in the Union—trying to get the Union out, waiters, bartenders, and everything, you know. . . ." While somewhat disjointed, the thrust of Cahill's compliant was as to his lack of work as a waiter, not getting rid of the Union. It was Rovegno's stress on the union contract provision on seniority which led to Rovegno's reference to removing the source of the seniority list in the first place; i.e., the Union. This response of Rovegno's contrasts sharply with assurance to the employees at the first general meeting that the seniority list would remain with the Union out.

union representation, and two of them recalled Respondent's offer to deal with a committee of employees on discipline or discharge matters. Both Rovegno and Bajada acknowledged presenting these offers during their testimony and Bajada admitted making an offer of individual contracts if the Union were out. Furthermore, Bajada did not deny referring to the hiring of new, nonunion employees or that the employees would be facing the prospect of a strike and replacement if they continued to insist on backing the union demands and its continued representation, as recounted by employee Smith.[16] I also find that the thrust of both Bajada's and Rovegno's presentations from the outset was to the effect that because of Respondent's unwillingness to continue the union relationship, it was terminating the union agreement. By virtue of its offers of direct dealing and employment security in the absence of the Union on the one hand, and the dire consequences of a strike and loss of employment if union representation were continued to be sought on the other hand, Respondent's chief officials also made clear the futility of continued union affiliation and representation and its own determination to sever the union relationship whatever decision the employees made. Thus, the possibility that the union relationship would be terminated which Bajada acknowledged telling employees in mid-June, had even then become a firm decision to get rid of the Union, as evidenced by Rovegno's discussions in June with Muccio and Bajada's offers made to Muccio the same month which were later repeated to employees at the meetings in July.

I also credit the three employees and Rovegno as to the facts respecting Respondent's poll of employees made during July, the results of which were never made known and were immediately destroyed by Respondent. In at least one instance the polling was accompanied by employer persuasion to reject the Union on the ballot, when Rovegno referred to the union dues Smith would be required to continue to pay, and at least one employee, Lasofsky, registered her preference in Rovegno's presence. The poll was taken during the same period of time employees were being subjected to Respondent's speeches and shortly after or contemporaneously with the decertification effort which Respondent had helped initiate and supported as described.

C. *The Collective-Bargaining Negotiations and Respondent's Refusal To Continue Further Meetings*

According to Campbell, four negotiation sessions were held between the parties during July. Campbell was accompanied by one or more other Local 6 agents, as well as Lasofsky, the steward, who attended three of the four meetings. Bajada represented Respondent. At the first session held just before July 5, the Union presented its proposals for a successor agreement. They included increases in wages, health and welfare benefits, vacation fund, clothing allowance, a limitation on covers (the number of people a waiter or waitress serves at specified affairs), and extra pay for service related to the Manor's cappucino machine. At the first meeting, Bajada offered a 15-cent increase in contribution to the vacation fund. Bajada also agreed to the Union's demand to limit the number of covers to 20. Aside from the item regarding covers, no other issues were resolved. At the second meeting, Bajada offered a 50-cent-a-job increase. At both the first and second meetings, Bajada informed Campbell he would not make a commitment about anything withot getting approval of his partner.[17] By the fourth meeting at the end of July, the parties were still apart on wages, the Union insisting on another 50 cents above Bajada's offer of a 50-cent increase, extra pay for the cappucinno machine service, and an increase in vacation pay, Respondent having offered 15 cents and the Union still demanding 25 cents. Bajada said he would not give any greater increase in wages or make any other agreements and that he would have to discuss it with his wife, and get back to the Union. Campbell also indicated he would try to persuade the employees to accept Bajada's offer.

Another meeting was scheduled but was never held. At least one scheduled date was canceled when Bajada's wife became very ill, and he advised Campbell he would not make it. Campbell called the Manor four times thereafter, into August, reaching Rovegno several times and leaving messages with him to have Bajada get back to him so the negotiations could continue. Rovegno acknowledged receiving a couple of messages from Campbell seeking a further meeting. Bajada testified to an understanding that Campbell was trying to reach him. However, Bajada never responded and admitted that by the first week in August he was no longer prepared to negotiate with the Union, having become disenchanted with the Union.

D. *Respondent's Reasons for Discontinuing Further Negotiations*

Respondent grounds its "disenchantment" with the Union and its refusal to continue further negotiations on several factors. One was the pendency of the decertification, the facts relating to its filing having been previously related. Bajada testified he wanted to wait for its outcome before deciding whether to continue the union relationship. Another factor were reports Bajada asserts he received from unnamed employees that the Union was not communicating with the unit employees about the status of negotiations or the Manor's offers and was not submitting its proposals for ratification to the union membership. Yet, at least three items, including the size of the wage increase per party, admittedly remained unresolved at the conclusion of the last meeting and Bajada admitted on cross-examination that at its conclusion both parties had agreed to consult Bajada with his wife, and Campbell with the employees, as to the acceptability of the other's outstanding wage position. Respondent at no point claimed an impasse had been reached as to any of the unresolved items. Neither did Bajada dispute Campbell's or the other representatives' right to negotiate on behalf of the unit members during the period when the

[16] Bajada testified that he had told the employees, while Respondent was still in negotiations during July, that they could go on strike if they did not agree to his proposals.

[17] At the time, Bajada and his wife, since deceased, held the sole and controlling interest in Respondent.

meetings were held. Yet, Bajada ignored Campbell's messages seeking to arrange a further bargaining session.

A third factor to which Respondent alludes was a claim that the Union had coerced employees to continue their union support and that, as a result, the Union did not represent an uncoerced majority at the time of contract renewal, thereby excusing Respondent's breaking off the talks and taking certain unilateral action. The only evidence Respondent offered related to an alleged threat made to an employee, John Best, by Edmund Price, administrator of the Union Fringe Benefit Fund to which, under the contract, Respondent had been obliged to contribute. According to Best, Price telephoned him at his regular weekday job at the end of June and asked him to attend an upcoming union meeting concerning problems in negotiating a contract with the Manor. Best responded that if they were picking sides he would side with the Manor on the question of the Union continuing to represent employees there. Best explained that, if he did not work at the Manor, since he lived in New Jersey, he would work some place closer to his home on weekends. But since he felt comfortable at the Manor, and he was getting two or three jobs a weekend, it was worth his while to stay. Best testified that Price next said, "you understand that if the Manor loses, then you won't be working any more." Best responded that he understood that and reported this conversation to Rovegno. On cross-examination, after being shown his affidavit given to a Board agent on October 28, 4 months after the conversation, Best still clung to his testimonial version of Price's threat, as against a directly contrary version in the affidavit in which Best swore that Price had said "that if Rockland Lake won I would be out of a job." Best acknowledged that he had read and initialed each page and had then signed the affidavit under oath within some months of the event. Based on this direct conflict in testimony as to the nature of the alleged threat, I conclude that Best has been impeached as a witness and his testimony is unworthy of belief.[18]

E. *Analysis and Conclusions*

The facts which I have found in the previous section justify the conclusion that Respondent, by its president and general manager, engaged in various acts and conduct commencing as early as the beginning of June 1980, which coerced, and interfered with, its employees' exercise of the rights protected by the Act. In questioning Muccio about his union sentiments in the context of a conversation in which he made clear the Manor's desire to rid itself of Local 6, Rovegno committed violations for which Respondent must be held responsible.[19] Rovegno was engaged in a process of probing and seeking to undermine the union support among its known leading supporters so that its ultimate objective of terminating the union relationship could be more easily achieved. Even without such a motive, Respondent's action reasonably tended to interfere with Muccio's exercise of his Section 7 rights.[20] Bajada's spelling out to Muccio of the benefits the employees could anticipate without the Union, further interfered with employee rights in violation of Section 8(a)(1) of the Act.[21] Rovegno's subsequent threat to Muccio to terminate any employee who stayed with the Union and Bajada's companion threat to newly hired employees that anybody who belonged to the Union would not be working for Respondent were further aggravated instances of interference in violation of Section 8(a)(1) of the Act.

The speeches both Rovegno and Bajada made to the assembled employees during July, reinforced the themes to which Muccio had been earlier subjected. By presenting detailed figures and making concrete financial proposals directly to the employees, while at the same time noting the termination of the union contract, denigrating the Union's demands, making clear the inevitability of a strike and the Employer's ability to withstand it and therefore the consequent loss of employment for a failure to agree to the proposals, none of which, of course, had been made at the bargaining table,[22] and including offers to deal with an employee grievance committee and enter individual contracts, Respondent's chief officials were bypassing the employees' exclusive representative, undermining the Union's authority, threatening employees with loss of their jobs, and promising benefits to induce union renunciation, all in violation of Section 8(a)(1) of the Act.[23]

Respondent's role in the instigation and aiding and abetting of the decertification petition and antiunion effort among a group of its employees, based upon its conduct described, as well as Rovegno's conversations with employee Cahill and others who became involved in the abortive effort, taint the petition and involved Respondent in further violations of Section 8(a)(1) and (5) of the Act.[24] Respondent's contemporaneous polling of employees, conducted individually in the manager's office under the circumstances earlier described, without the safeguards required by the Board, and in an atmosphere permeated by the Employer's coercive speeches

[18] Respondent claims that in the final paragraph of the affidavit Best denies he had any other conversations in which a union representative told him he would lose his job for not supporting the Union. This additional statement does not clarify Best's intention to use the word "lost" rather than "won" earlier in the affidavit in describing the threat, assuming Best could be credited with such intention when his actions in reading, initialing, and signing the document were to the contrary. It makes more sense to conclude that if the Union sought by fear to persuade Best to support it, it would point out that if the union effort were unsuccessful, Respondent would seek to replace all employees who had been, like Best, dues-paying members of Local 6, then that if the union effort in retaining its status as exclusive agent was successful, it would somehow be able to persuade Respondent to terminate him.

[19] *Solboro Knitting Mills*, 165 NLRB 1062 (1967), affd. 575 F.2d 936 (2d Cir. 1978).

[20] See *Paceco, a Division of Fruehauf Corporation*, 237 NLRB 399 (1978).

[21] *Pine Valley Meats, Inc.*, 255 NLRB 402 (1981).

[22] All of the proposals were conditioned on the Union's removal, since they dealt with distributions of moneys which had previously been paid to the Union on the employees' behalf under the expired contract.

[23] See *Columbia Building Materials, Inc.*, 239 NLRB 1342 (1979); *Sevakis Industries, Inc.*, 239 NLRB 238 NLRB 309 (1978). This conduct also breached Respondent's continuing bargaining obligations under Sec. 8(a)(5) and (1) of the Act. *Hayden Electric, Inc.*, 256 NLRB 750 (1981); *Rockingham Machine-Lunex Company*, 255 NLRB 89 (1981).

[24] *American Sink Top & Cabinet Co., Inc.*, 242 NLRB 408 (1979); *Consolidated Rebuilders, Inc.*, 171 NLRB 1415, 1417 (1968). See also *Columbia Building Materials, Inc., supra.*

and individual interrogations and threats, likewise violated Section 8(a)(1) and (5) of the Act.[25] Furthermore, Respondent had no objective basis for doubting the Union's continued majority status.[26] Certainly, none could be derived from Baada's understanding of the then high percentage of union memberships and checkoff authorizations among the unit members. Nor could Bajada's reliance on expressions of dissatisfaction with the Union or its communications with employees during negotiations by certain unspecified and unnamed employees provide that basis.[27] It is clear that the polling was not undertaken legitimately to determine the Union's strength among the workforce but as another device to procure the Union's demise and to confirm the success of Respondent's contemporaneous campaign of interference and coercion in order to separate the employees from their longstanding bargaining agent.[28] Respondent's failure to retain and produce the poll only confirms the other evidence of its unlawful conduct.

Respondent's final acts on this record of cutting off further negotiation sessions, discontinuing contributions under the expired contract, and unilaterally implementing on an *ad hoc* basis the individual payments to employees who requested them of moneys previously reserved for the Union under the agreement, constitute evidence of a continuing refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.[29] Respondent, on summation and in its brief, denies that it withdrew recognition from the Union. Respondent's conduct cannot be viewed in any other manner. By embarking on a course of action of individual dealing, threats, promises, and unilateral implementation of changes in employee terms and conditions of employment and ignoring union requests for further meetings, Respondent evidenced a withdrawal of recognition without ever putting it into words.

Respondent could not on this record overcome the Union's rebuttable presumption of continued majority representative status. It could neither produce untainted evidence of the Union's loss of majority status nor could it show a reasonably based doubt as to the Union's continued majority status, since the objective considerations necessary to support such a showing[30] were lacking, and such a doubt could not here be raised as required in a context free of unfair labor practices.[31] On the basis of the conclusions already reached, Respondent's claimed reliance on the results of its unlawful poll, the assisted filing of the decertification petition,[32] the evidence of some undocumented employee dissatisfaction with union communication on negotiations, the alleged and discredited union threat to employee Best—all items argued in Respondent's brief as adequately supporting a good-faith doubt as to the Union's continued majority status—are all without justification. In light of "the totality of circumstances" surrounding Respondent's withdrawal of recognition,[33] it was duty bound to continue recognizing and dealing with the Union as the bargaining agent of the unit employees[34] while at the same time continuing in effect all terms and conditions of employment encompassed in its expired agreement with the Union until it had negotiated a renewal agreement or bargained to a true impasse.[35]

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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[25] *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967); *Montgomery Ward & Co., Incorporated*, 210 NLRB 717 (1974).

[26] Such a basis is required before an employer may legitimately poll employees regarding their desire for continued representation by a certified union, *Mid-Continent Refrigerated Service Company*, 228 NLRB 917 (1977). Since the presumption of continued majority status applies to incumbent unions either certified or voluntarily recognized for more than 1 year, *Celanese Corporation of America*, 95 NLRB 664 (1951), including after expiration of a collective-bargaining agreement with respect to an established representative for many years, *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970), there is every reason to apply this principle to Respondent's polling of the employees represented by Local 6 in the agreed appropriate unit since 1972.

[27] See *Thomas Industries, Inc.*, 255 NLRB 646 (1981); see also *Retired Persons Pharmacy* v. *N.L.R.B.*, 519 F.2d 486 (2d Cir. 1975).

[28] See *Juckson Sportswear Corporation*, 211 NLRB 891 (1974); *Montgomery Ward & Co., Incorporated*, 210 NLRB 717 (1974).

By conducting the poll during the month when it was also delivering the captive-audience speeches undermining the Union, Respondent created an atmosphere which interfered with the free exercise of employee choice, cf. *Peerless Plywood Company*, 107 NLRB 427 (1953).

[29] Respondent at no time has claimed, and the evidence contradicts, that the parties were at impasse after the fourth meeting. See *Crest Beverage Co., Inc.*, 231 NLRB 116 (1977). Even assuming an impasse as of August 1, 1980, Respondent was not free to make any changes, such as ceasing the funding of health and welfare, or vacation coverages, which were not encompassed in or consistent with its last rejected offer. *Caravelle Boat Company*, 227 NLRB 1355, 1358 (1977); *Royal Himmel Distilling Company*, 203 NLRB 370, fn. 3 (1973). The record fails to show that any changes made or contemplated by Respondent were consistent with any of its positions on the unresolved meeting. To the contrary, health and welfare contributions had been resolved and Respondent had last offered a 15-cent increase in vacation contribution.

[30] See *N.L.R.B.* v. *Gulfmont Hotel Company*, 362 F.2d 588 (5th Cir. 1966), enfg. 147 NLRB 997 (1964).

[31] See *Nu-Southern Dyeing & Finishing, Inc., and Henderson Combining Co.*, 179 NLRB 573, fn. 1 (1969), enfd. in part 444 F.2d 11 (4th Cir. 1971).

[32] Even assuming that Respondent had objective considerations for entertaining a good-faith doubt of the Union's continuing majority, it still was not free to take advantage of the pendency of the decertification petition, from August 12 to October 3, 1980, for the purpose of instituting unilateral changes. *The Baughman Company*, 248 NLRB 1346 (1980).

[33] The standard which the Board applies in determining whether an employer's withdrawal of recognition is unlawful, *Guerdon Industries, Inc., Armor Mobile Homes Division*, 218 NLRB 658, 661 (1975).

[34] *Automated Business Systems, etc.*, 205 NLRB 532, 534 (1973); *Henry Cauthorne, an Individual t/a Cauthorne Trucking*, 256 NLRB 721 (1981); *Paramount Potato Chip Company, Inc.*, 252 NLRB 794 (1980).

[35] Respondent's claim, at pp. 19 and 20 of its brief, that Respondent relied to its detriment upon the allegations of the complaint in Case 2-CB-8535 with respect to the Union's threat, by Fund Administrator Price, to employee Best, in concluding that any union majority was coerced, thereby excusing withdrawal of recognition, lacks merit. Respondent appears to be asserting an argument for collateral estoppel, estopping the General Counsel from denying in the instant proceeding that the threat was ever made. No facts were found in the CB proceeding. The General Counsel, by the Regional Director, alleged but did not prove Price's threat, and the evidence before me warrants the conclusion I made discrediting Best. Respondent cannot rely on the informal disposition had in that case. See *Markle Manufacturing Company of San Antonio*, 239 NLRB 1142, 1147 (1979), enfd. in relevant part 623 F.2d 1122, 1125-28 (5th Cir. 1980). See also *McBride's of Naylor Road*, 229 NLRB 795, 797, fn. 2 (1977).

3. All waiters, waitresses and bartenders employed by Respondent at its facility located at Route 9W, Congers, Rockland County, New York, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By coercively interrogating its employees concerning their union views, threatening its employees with discharge if they joined or continued their membership in, or support of, the Union, promising benefits to its employees if they abandoned their support of the Union, informing its employees it would no longer deal with the Union as their collective-bargaining agent, offering to recognize a new union or grievance committee formed by its employees, or to enter individual contracts with them, conducting a poll among its employees about whether they wanted the Union to continue to represent them, and encouraging, inducing, and aiding its employees in preparing, signing, and filing a decertification petition, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By engaging in the conduct enumerated above, bypassing the Union and dealing directly with its employees and undermining the status of the Union as the exclusive bargaining representative of the employees in the appropriate unit described above, and by withdrawing recognition and refusing on and after August 1, 1980, to meet and bargain collectively with the Union and by unilaterally discontinuing vacation and health and welfare contributions as found herein,[36] Respondent has engaged in and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Respondent shall be ordered to cease and desist from the unfair labor practices found, and, affirmatively, to make whole the unit employees by making all vacation and health and welfare contributions as required by the collective-bargaining agreement that expired July 5, 1980, to the extent that such contributions have not been made or that the employees have not otherwise been made whole for their ensuing medical expenses and lost vacation credits,[37] and to continue such contributions until Respondent negotiates in good faith with the Union to a new contract or to an impasse.

Since there is also reason to believe that some of the employees themselves contributed to the maintenance of health and welfare coverage and vacation benefits after Respondent unlawfully ceased contributing, Respondent shall be ordered to reimburse such employees for such outlays and losses, with interest, as determined in the compliance stage.[38]

Since at least some of the employees employed in the bargaining unit after July 5, 1980, will probably have qualified for benefits under the health and welfare coverage and most, if not all, will have qualified for vacation benefits under the vacation fund, I shall also recommend that Respondent take appropriate action to notify, in writing, all employees and former employees that so qualified, of their entitlement to those benefits.[39]

I shall also recommend that Respondent be ordered to compensate the trust funds for administration costs and other expenses incurred by them as a result of their acceptance of retroactive payments, *Turnbull Enterprises, Inc.*, 259 NLRB 934, leaving to the compliance stage the determination of these amounts.[40]

Finally, Respondent shall be ordered generally to bargain in good faith with the Union.[41]

Upon the foregoing findings of fact, conlusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[42]

The Respondent, Rockland Lake Manor, Inc., Congers, New York, its officers, agents, successors, and assigns, shall:

[36] Although not specifically alleged by the General Counsel in the complaint, the facts regarding Respondent's repudiation of the obligation to continue fund contributions after the contract's expiration are closely related to other aspects of Respondent's conduct which were charged, and were fully developed and litigated herein. See, e.g., *Multi-Medical Convalescent and Nursing Center of Towson*, 225 NLRB 429 (1976).

[37] It is unclear whether Respondent has provided alternative health and welfare coverage and vacation benefits. To the extent it did so, I will not recommend that the Board order duplicate coverage and benefits retroactively since such a requirement would be punitive in nature and not justified. *Wayne's Olive Knoll Farms, Inc., d/b/a Wayne's Dairy*, 223 NLRB 260, 265 (1976); *Service Roofing Company*, 200 NLRB 1015 (1972).

[38] See *Crest Beverage Co., Inc.*, 231 NLRB 116 (1977). The amounts due shall be computed in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[39] *Turnbull Enterprises, Inc.*, 259 NLRB 934, 935-936 (1982).

[40] These additional amounts are in place of interest of a fixed rate, which the Board has determined are more appropriate because of the variable and complex provisions of employee benefit fund agreements. Depending upon the circumstances, such amounts may be determined by reference to provisions of the governing trust documents, and evidence of any loss directly attributable to the unlawful action such as loss of return on investment of portion of funds withheld, additional administrative costs, and the like, but not collateral losses. See *Merryweather Optical Company*, 240 NLRB 1213, 1216, fn. 7 (1979); *Turnbull, supra.*

[41] I do not adopt the General Counsel's suggested remedy that the Union be permitted to determine whether and to what extent unilateral changes should be rescinded. The only such changes which were litigated concern the failure to continue fund payments. Furthermore, unlike the facts in *Federal Mogul Corporation*, 209 NLRB 343, 355 (1974), cited by the General Counsel, there appear to be no changes to which the Union has acquiesced. Finally, the Board in *Atlas Tack Corporation*, 226 NLRB 222 (1976), rejected the rationale of Member Walther, concurring in part and dissenting in part, that the traditional make-whole remedy for employees whose benefits have been unilaterally discontinued may be superseded by transferring the backpay award to their Union subject to its right to bargain it down or away in negotiations with the employer.

[42] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes

1. Cease and desist from:

(a) Threatening its employees with discharge if they join or continue their membership in or support of Local 6, Hotel, Restaurant and Club Employees and Bartenders Union, AFL-CIO, or any other labor organization; coercively interrogating its employees about their union views; promising benefits to its employees if they abandon their support of the Union; informing its employees it will no longer deal with the Union as their collective-bargaining agent; offering to recognize a new union or grievance committee formed by its employees or to enter individual contracts with them; and encouraging, inducing, and aiding its employees in preparing, signing, and filing a decertification petition.

(b) Polling or otherwise interrogating its employees to ascertain their union views in the absence of objective considerations warranting a reasonable doubt of the Union's continuing status as the collective-bargaining representative of the majority of its employees.

(c) Refusing to recognize or bargain collectively with Local 6, Hotel, Restaurant and Club Employees and Bartenders Union, AFL-CIO, as the exclusive representative of its employees in the appropriate unit described below, by engaging in the foregoing conduct, bypassing the Union and dealing directly with its employees and undermining the status of the Union as such exclusive representative, by withdrawing recognition and refusing on and after August 1, 1980, to meet and bargain collectively with the Union, and by unilaterally changing established terms and conditions of employment of employees in the bargaining unit by discontinuing vacation and health and welfare contributions.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Bargain on request with the aforementioned Union as the representative of its employees in the appropriate unit concerning wages, hours, vacation and health and welfare benefits, and other terms and conditions of employment, and, if an understanding is reached, embody it in a signed document. The appropriate unit is:

> All waiters, waitresses and bartenders employed by Respondent at its facility located at Route 9W, Congers, Rockland County, New York.

(b) Make whole the employees in the above unit by paying all vacation and health and welfare contributions as required by the collective-bargaining agreement that expired July 5, 1980, to the extent that such contributions have not been made or that the employees have not otherwise been made whole for their ensuing medical expenses and lost vacation credits, and continue such payments until Respondent negotiates in good faith with the Union to a new agreement or to an impasse. This shall include reimbursing any employees who themselves contributed to the maintenance of health and welfare coverage and vacation benefits after Respondent unlawfully ceased contributing in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Compensate the Union Fringe Benefit and Vacation Funds for administration costs and other expenses and loss of interest incurred by the funds as a result of their acceptance of retroactive payments required to be made hereunder in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Notify, in writing, all persons employed in the bargaining unit after July 5, 1980, of their entitlement to damages for loss of benefits.

(f) Post at its Congers, Rockland County, New York, facility copies of the attached notice marked "Appendix."[43] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director of Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[43] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."